

US Department of Energy

JUL 14 2011

Electricity Delivery and  
Energy Reliability

Glacial Energy of Texas  
24 Route 6A Sandwich, MA 02563

July 13, 2011

Odessa Hopkins  
Office of Electricity Delivery & Energy Reliability  
OE-20, Room 6H-034  
U.S. Department of Energy  
1000 Independence Ave., S.W.  
Washington, DC 20585

Re: Application of Glacial Energy of Texas, Inc. for Authority to Transmit Electric  
Energy to Mexico

Dear Ms. Hopkins:

Pursuant to 10 C.F.R. § 205.300, *et seq.* of the Department of Energy regulations, enclosed for filing on behalf of Glacial Energy of Texas, Inc. is an original and 16 copies of an Application for Authority to Transmit Electric Energy to Mexico. Additionally, please find enclosed a check in the amount of \$500 payable to the Treasurer of the United States.

Please date-stamp and return in the postage pre-paid envelope the additional copy of the enclosed application. Should you have any questions please contact the undersigned.

Respectfully submitted,



Michael Motylinski

Glacial Energy

5326 Yacht Haven Grande, #36

St. Thomas, V.I. 00802

Phone: 340-201-6069

Email: [michael.motylinski@glacialenergy.com](mailto:michael.motylinski@glacialenergy.com)

JUL 14 2011

Electricity Delivery and  
Energy Reliability

UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRICITY DELIVERY  
AND ENERGY RELIABILITY

Glacial Energy of Texas, Inc. )

Docket No. EA-\_\_\_

APPLICATION OF GLACIAL ENERGY OF TEXAS, INC.  
FOR AUTHORITY TO TRANSMIT ELECTRIC ENERGY TO MEXICO

Glacial Energy of Texas, Inc., pursuant to Section 202(e) of the Federal Power Act ("FPA"), 16 U.S.C. § 824a(e), and 10 C.F.R. 205.300 *et seq.*, hereby files this application ("Application") for blanket authority to transmit electric energy from the United States to Mexico.

I. DESCRIPTION OF APPLICANT

The exact legal name of the applicant is Glacial Energy of Texas, Inc. ("Glacial"). Glacial was organized and incorporated May 23, 2005, under the laws of the State of Nevada and is currently authorized to do and does business in the State of Texas. Glacial's principal and executive offices are located at 24 Route 6A, Sandwich, MA 02563. Glacial is not currently authorized to export electric energy to Mexico. Glacial is a wholly-owned, direct subsidiary of Glacial Energy Holdings.

Glacial is a power marketer engaged in the marketing of wholesale electric power in the State of Texas. On March 26, 2008, Glacial was authorized by the Electric Reliability Council of Texas ("ERCOT") to make wholesale sales of electric power at market-based rates.<sup>1</sup> Glacial intends to operate as a wholesale power marketer, and will purchase and sell electricity in wholesale markets in Texas and Mexico. All Glacial's wholesale power transactions will be at rates negotiated between Glacial and its counterparties.

II. JURISDICTION

The United States Department of Energy ("Department"), Office of Electricity Delivery and Energy Reliability, is the sole agency with jurisdiction over the proposed export of energy to Mexico pursuant to Federal Power Act Section 202(e), 16 U.S.C. § 824a. No other known Federal, State or local government has jurisdiction over the proposed actions described in the Application.<sup>2</sup>

III. COMMUNICATIONS

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<sup>1</sup> See Standard Form Market Participant Agreement between Glacial Energy of Texas, Inc. and Electric Reliability Council of Texas, Inc. (attached). As discussed above, Glacial has been authorized by ERCOT to make wholesale sales of electric power at market-based rates not in interstate commerce, and, therefore, is not subject to the jurisdiction of the Federal Energy Regulatory Commission.

All service and correspondence concerning this application should be sent to:

Michael B. Giery  
Senior Corporate Counsel  
Glacial Energy  
5326 Yacht Haven Grande, #36  
St. Thomas, V.I. 00802  
1-888-452-2425-office  
Email: mike.giery@glacialenergy.com

#### IV. DESCRIPTION OF TRANSMISSION FACILITIES

Glacial seeks authority to transmit electric power as a power marketer over existing cross-border facilities between the United States and Mexico. Exhibit "C" of this Application provides the locations of those facilities, their Presidential Permit numbers, and other identifying information. Glacial will comply with the terms and conditions contained in the export authorizations issued for those cross-border facilities as well as other export limitations that the Department may deem appropriate for those facilities, consistent with other Department orders authorizing electricity exports by power marketers.<sup>3</sup>

#### V. TECHNICAL DISCUSSION OF PROPOSAL

Glacial is engaged in the marketing of wholesale electric power as a power marketer, and seeks authority to export electric power into Mexico over the existing cross-border facilities described in Exhibit "C". Glacial has no electric power supply system of its own on which its exports of power could have a reliability or stability impact. Glacial's supply obligations are those for which it has contracted. The electric power that will be exported pursuant to the requested export authorization, whether on a firm or interruptible basis, will be surplus to the system of the generator of such power. Thus, the exports proposed herein by Glacial will not impair the sufficiency of power in the United States, nor will the transactions impede or tend to impede the regional coordination of electric utility planning or operation.<sup>4</sup> Glacial will make all necessary commercial arrangements and will obtain any and all other regulatory approvals required in order to schedule and deliver power exports.

The Department has taken a flexible approach in determining the information necessary to evaluate the reliability for a specific market and has held that existing technical analysis support the present authorizations to export power through designated international border transmission. Glacial respectfully requests that the Department continue to apply this standard during its review of the instant application and grant Glacial the same benefits accorded to other electric power marketers. Additionally, Glacial agrees to comply with all reliability criteria, standards, and guidelines of the North American Electric Reliability Council ("NERC"), on such

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<sup>3</sup> See, e.g., *Constellation NewEnergy, Inc.*, FE Docket No. EA-247-B (April 8, 2005) (authorization to export to Mexico); *Destec Power Services, Inc.*, FE Docket No. EA-113 (May 31, 1996) (authorization to export to Mexico).

<sup>4</sup> See, e.g., *Enron Power Marketing, Inc.*, FE Docket No. EA-102 (Feb. 6, 1996).

terms as expressed therein, and as such criteria, standards, and guides may be amended from time to time.

Finally, Glacial requests that the Department conclude that the authorization under this application qualifies for a categorical exclusion under the National Environmental Policy Act of 1969, and, thus, this application would not require the preparation of either an environmental impact statement or environmental assessment.

## VI. PROPOSED PROCEDURES

Glacial proposes to export electricity through the existing transmission facilities at the border between the United States and Mexico as set forth in Exhibit "C." Glacial intends to comply with the applicable requirements of ERCOT and the export limitations associated with each facility. In addition, when scheduling the delivery of power, Glacial will comply with applicable NERC reliability criteria, standards, and guidelines. Glacial also commits to furnish quarterly reports to the Department within thirty (30) days following each calendar quarter showing the gross amount of electricity delivered, the consideration received in return for each month of the previous quarter, and the maximum hourly rate of transmission across the U.S. border to Mexico. Glacial seeks a continuance of its blanket authorization for exports for a minimum of five (5) years, which may be extended upon further application to the Department.

## VI. EXHIBITS AND ATTACHMENTS

The following information is provided pursuant to the required exhibits as set forth in 10 C.F.R. § 205.303.

Exhibit A	N/A
Exhibit B	Legal opinion of Senior Corporate Counsel for Glacial, Mike Giery, Esq.
Exhibit C	List of proposed border transmission facilities
Exhibit D	N/A
Exhibit E	Glacial is 100% owned by Glacial Energy Holdings.
Exhibit F	N/A

Attachment 1 Verification of Corporate Counsel

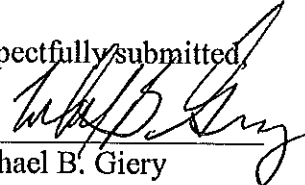
Attachment 2 A copy of the Market Participant Agreement between Glacial and ERCOT is attached.

To the extent necessary, Glacial requests a waiver of the requirement to provide the exhibits that are not applicable to its application, as noted.

VII. CONCLUSION

Wherefore, in consideration of the foregoing, Glacial respectfully requests that the Department approve this Application for blanket authority to transmit electric energy to Mexico.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael B. Giery", written over a horizontal line.

Michael B. Giery  
Senior Corporate Counsel  
Glacial Energy of Texas, Inc.

UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRICITY DELIVERY  
AND ENERGY RELIABILITY

DOCKET NO. EA-\_\_\_\_\_  
GLACIAL ENERGY OF TEXAS, INC.

**EXHIBIT A**

N/A

UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRICITY DELIVERY  
AND ENERGY RELIABILITY

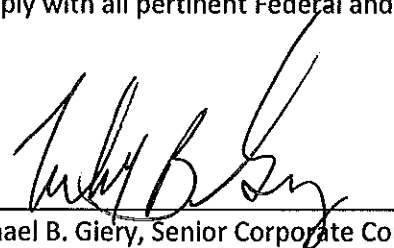
DOCKET NO. EA-\_\_\_\_  
GLACIAL ENERGY OF TEXAS, INC.

**EXHIBIT B**

Legal Opinion of Counsel

The following opinion is given in support of the Application of Glacial Energy of Texas, Inc. for authorization to transmit electric energy to Mexico, dated July 13, 2011.

1. I am an attorney at law, authorized to practice law in the State of Massachusetts;
2. I am employed as an attorney;
3. Glacial Energy of Texas, Inc. is duly organized, validly existing and in good standing under the laws of the State of Nevada;
4. Glacial Energy of Texas, Inc. has full corporate power and authority to export electric energy to Mexico as requested in the Application;
5. Glacial Energy of Texas, Inc. has complied or will comply with all pertinent Federal and state laws.

A handwritten signature in black ink, appearing to read "Michael B. Giery", is written over a horizontal line.

Michael B. Giery, Senior Corporate Counsel  
Glacial Energy of Texas, Inc.

UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRICITY DELIVERY  
AND ENERGY RELIABILITY

DOCKET NO. EA-\_\_\_\_  
GLACIAL ENERGY OF TEXAS, INC.

EXHIBIT C

UNITED STATES INTERCONNECTIONS WITH MEXICO

OWNER	LOCATION	VOLTAGE	PRES. PERMIT NO.
AEP TEXAS CENTRAL COMPANY	LAREDO, TX	138 kV	PP-317
		230 kV	PP-317
	BROWNSVILLE, TX	138 kV	PP-94
		69 kV	
	EAGLE PASS, TX	138 kV	PP-219
EL PASO ELECTRIC COMPANY	ASCARATE, TX	115 kV	PP-48
SHARYLAND UTILITIES, INC.	MCALLEN, TX	138 kV	PP-285



UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRICITY DELIVERY  
AND ENERGY RELIABILITY

**DOCKET NO. EA-\_\_\_\_**  
**GLACIAL ENERGY OF TEXAS, INC.**

**EXHIBIT D**

N/A

UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRICITY DELIVERY  
AND ENERGY RELIABILITY

**DOCKET NO. EA-\_\_\_\_**  
**GLACIAL ENERGY OF TEXAS, INC.**

**EXHIBIT E**

N/A

UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRICITY DELIVERY  
AND ENERGY RELIABILITY

DOCKET NO. EA-\_\_\_\_  
GLACIAL ENERGY OF TEXAS, INC.

EXHIBIT F

N/A

VERIFICATION

TERRITORY OF THE VIRGIN ISLANDS                    )  
DISTRICT OF ST. THOMAS AND ST. JOHN            )       SS:

Michael B. Giery, being duly sworn, states that he is Senior Corporate Counsel of Glacial Energy of Texas, Inc.; that he is authorized to execute this Verification; that he has read the above and foregoing document and is familiar with the contents thereof; and that all allegations of fact therein contained are true and correct to the best of his knowledge and belief.

  
Michael B. Giery

Sworn to me this 13<sup>th</sup> day of July, 2011.

Notary Public

My Commission Expires:

**NOTARY PUBLIC**

Name: *Marguerite Dumestre Duncan*  
My Comm. Exp: *July 15, 2013*  
NP Comm. # *NP 037-09*  
St. Thomas / St. John District



Standard Form Market Participant Agreement  
between  
Glacial Energy of Texas Inc.  
and  
Electric Reliability Council of Texas, Inc.

This Market Participant Agreement ("Agreement"), effective as of the 26 day of March, 2008 ("Effective Date"), is entered into by and between Glacial Energy of Texas Inc, a Texas Load Serving Entity ("Participant") and Electric Reliability Council of Texas, Inc., a Texas non-profit corporation ("ERCOT").

Recitals

WHEREAS:

- A. As defined in the ERCOT Protocols, Participant is a (check all that apply):
- ☒ Load Serving Entity (LSE)
  - ☒ Qualified Scheduling Entity (QSE)
  - ☐ Transmission Service Provider (TSP)
  - ☐ Distribution Service Provider (DSP)
  - ☐ Congestion Revenue Right (CRR) Account Holder
  - ☐ Resource Entity
  - ☐ Renewable Energy Credit (REC) Account Holder
- B. ERCOT is the Independent Organization certified under PURA §39.151 for the ERCOT Region; and
- C. The Parties enter into this Agreement in order to establish the terms and conditions by which ERCOT and Participant will discharge their respective duties and responsibilities under the ERCOT Protocols.

Agreements

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, ERCOT and Participant (the "Parties") hereby agree as follows:

Section 1. Notice.

All notices required to be given under this Agreement shall be in writing, and shall be deemed delivered three (3) days after being deposited in the U.S. mail, first class postage prepaid, registered (or certified) mail, return receipt requested, addressed to the other Party at the address specified in this Agreement or shall be deemed delivered on the day of receipt if sent in another manner requiring a signed receipt, such as courier delivery or overnight delivery service. Either Party may change its address for such notices by delivering to the other Party a written notice referring specifically to this Agreement. Notices required under the ERCOT Protocols shall be in accordance with the applicable Section of the ERCOT Protocols.

**If to ERCOT:**

Electric Reliability Council of Texas, Inc.  
Attn: Legal Department  
7620 Metro Center Drive  
Austin, Texas 78744-1654  
Telephone: (512) 225-7000  
Facsimile: (512) 225-7079

**If to Participant:**

Glacial Energy of Texas Inc  
Attn: Katherine Seitan  
2602 McKinney Avenue, #220  
Dallas, TX 75204  
Telephone: (281) 964-3990  
Facsimile: (281) 852-2300

**Section 2. Definitions.**

- A. Unless herein defined, all definitions and acronyms found in the ERCOT Protocols shall be incorporated by reference into this Agreement.
- B. "ERCOT Protocols" shall mean the document adopted by ERCOT, including any attachments or exhibits referenced in that document, as amended from time to time, that contains the scheduling, operating, planning, reliability, and settlement (including customer registration) policies, rules, guidelines, procedures, standards, and criteria of ERCOT. For the purposes of determining responsibilities and rights at a given time, the ERCOT Protocols, as amended in accordance with the change procedure(s) described in the ERCOT Protocols, in effect at the time of the performance or non-performance of an action, shall govern with respect to that action.

**Section 3. Term and Termination.**

- A. Term. The initial term ("Initial Term") of this Agreement shall commence on the Effective Date and continue until the last day of the month which is twelve (12) months from the Effective Date. After the Initial Term, this Agreement shall automatically renew

for one-year terms (a "Renewal Term") unless the standard form of this Agreement contained in the ERCOT Protocols has been modified by a change to the ERCOT Protocols. If the standard form of this Agreement has been so modified, then this Agreement will terminate upon the effective date of the replacement agreement. This Agreement may also be terminated during the Initial Term or the then-current Renewal Term in accordance with this Agreement.

B. Termination by Participant. Participant may, at its option, terminate this Agreement:

- (1) immediately upon the failure of ERCOT to continue to be certified by the PUCT as the Independent Organization under PURA §39.151 without the immediate certification of another Independent Organization under PURA §39.151;
- (2) if the "REC Account Holder" box is checked in Section A. of the *Recitals* section of this Agreement, Participant may, at its option, terminate this Agreement immediately if the PUCT ceases to certify ERCOT as the entity approved by the PUCT ("Program Administrator") for carrying out the administrative responsibilities related to the Renewable Energy Credit Program as set forth in PUC Substantive Rule 25.173(g) without the immediate certification of another Program Administrator under PURA §39.151; or
- (3) for any other reason at any time upon thirty days written notice to ERCOT.

C. Effect of Termination and Survival of Terms. If this Agreement is terminated by a Party pursuant to the terms hereof, the rights and obligations of the Parties hereunder shall terminate, except that the rights and obligations of the Parties that have accrued under this Agreement prior to the date of termination shall survive.

Section 4. Representations, Warranties, and Covenants.

A. Participant represents, warrants, and covenants that:

- (1) Participant is duly organized, validly existing and in good standing under the laws of the jurisdiction under which it is organized and is authorized to do business in Texas;
- (2) Participant has full power and authority to enter into this Agreement and perform all obligations, representations, warranties and covenants under this Agreement;
- (3) Participant's past, present and future agreements or Participant's organizational charter or bylaws, if any, or any provision of any indenture, mortgage, lien, lease, agreement, order, judgment, or decree to which Participant is a party or by which its assets or properties are bound do not materially affect performance of Participant's obligations under this Agreement;

- (4) Market Participant's execution, delivery and performance of this Agreement by Participant have been duly authorized by all requisite action of its governing body;
- (5) Except as set out in an exhibit (if any) to this Agreement, ERCOT has not, within the twenty-four (24) months preceding the Effective Date, terminated for Default any Prior Agreement with Participant, any company of which Participant is a successor in interest, or any Affiliate of Participant;
- (6) If any Defaults are disclosed on any such exhibit mentioned in subsection 4.A(5), either (a) ERCOT has been paid, before execution of this Agreement, all sums due to it in relation to such Prior Agreement, or (b) ERCOT, in its reasonable judgment, has determined that this Agreement is necessary for system reliability and Participant has made alternate arrangements satisfactory to ERCOT for the resolution of the Default under the Prior Agreement;
- (7) Participant has obtained, or will obtain prior to beginning performance under this Agreement, all licenses, registrations, certifications, permits and other authorizations and has taken, or will take prior to beginning performance under this Agreement, all actions required by applicable laws or governmental regulations except licenses, registrations, certifications, permits or other authorizations that do not materially affect performance under this Agreement;
- (8) Participant is not in violation of any laws, ordinances, or governmental rules, regulations or order of any Governmental Authority or arbitration board materially affecting performance of this Agreement and to which it is subject;
- (9) Participant is not Bankrupt, does not contemplate becoming Bankrupt nor, to its knowledge, will become Bankrupt;
- (10) Participant acknowledges that it has received and is familiar with the ERCOT Protocols; and
- (11) Participant acknowledges and affirms that the foregoing representations, warranties and covenants are continuing in nature throughout the term of this Agreement. For purposes of this Section, "materially affecting performance" means resulting in a materially adverse effect on Participant's performance of its obligations under this Agreement.

B. ERCOT represents, warrants and covenants that:

- (1) ERCOT is the Independent Organization certified under PURA §39.151 for the ERCOT Region;
- (2) ERCOT is duly organized, validly existing and in good standing under the laws of Texas, and is authorized to do business in Texas;



- (3) ERCOT has full power and authority to enter into this Agreement and perform all of ERCOT's obligations, representations, warranties and covenants under this Agreement;
- (4) ERCOT's past, present and future agreements or ERCOT's organizational charter or bylaws, if any, or any provision of any indenture, mortgage, lien, lease, agreement, order, judgment, or decree to which ERCOT is a party or by which its assets or properties are bound do not materially affect performance of ERCOT's obligations under this Agreement;
- (5) The execution, delivery and performance of this Agreement by ERCOT have been duly authorized by all requisite action of its governing body;
- (6) ERCOT has obtained, or will obtain prior to beginning performance under this Agreement, all licenses, registrations, certifications, permits and other authorizations and has taken, or will take prior to beginning performance under this Agreement, all actions required by applicable laws or governmental regulations except licenses, registrations, certifications, permits or other authorizations that do not materially affect performance under this Agreement;
- (7) ERCOT is not in violation of any laws, ordinances, or governmental rules, regulations or order of any Governmental Authority or arbitration board materially affecting performance of this Agreement and to which it is subject;
- (8) ERCOT is not Bankrupt, does not contemplate becoming Bankrupt nor, to its knowledge, will become Bankrupt; and
- (9) ERCOT acknowledges and affirms that the foregoing representations, warranties, and covenants are continuing in nature throughout the term of this Agreement. For purposes of this Section, "materially affecting performance" means resulting in a materially adverse effect on ERCOT's performance of its obligations under this Agreement.

#### Section 5. Participant Obligations.

- A. Participant shall comply with, and be bound by, all ERCOT Protocols.
- B. Participant shall not take any action, without first providing written notice to ERCOT and reasonable time for ERCOT and Market Participants to respond, that would cause a Market Participant within the ERCOT Region that is not a "public utility" under the Federal Power Act or ERCOT itself to become a "public utility" under the Federal Power Act or become subject to the plenary jurisdiction of the Federal Energy Regulatory Commission.

#### Section 6. ERCOT Obligations.

- A. ERCOT shall comply with, and be bound by, all ERCOT Protocols.
- B. ERCOT shall not take any action, without first providing written notice to Participant and reasonable time for Participant and other Market Participants to respond, that would cause Participant, if Participant is not a "public utility" under the Federal Power Act, or ERCOT itself to become a "public utility" under the Federal Power Act or become subject to the plenary jurisdiction of the Federal Energy Regulatory Commission. If ERCOT receives any notice similar to that described in Section 5.B. from any Market Participant, ERCOT shall provide notice of same to Participant.

#### Section 7. Payment

For the transfer of any funds under this Agreement directly between ERCOT and Participant and pursuant to the Settlement procedures for Ancillary Services described in the ERCOT Protocols, the following shall apply:

- A. Participant appoints ERCOT to act as its agent with respect to such funds transferred and authorizes ERCOT to exercise such powers and perform such duties as described in this Agreement or the ERCOT Protocols, together with such powers or duties as are reasonably incidental thereto.
- B. ERCOT shall not have any duties, responsibilities to, or fiduciary relationship with Participant and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement except as expressly set forth herein or in the ERCOT Protocols.

#### Section 8. Default

##### A. Event of Default.

- (1) Failure to make payment or transfer funds, provide collateral or designate/maintain an association with a QSE (if required by the ERCOT Protocols) as provided in the ERCOT Protocols shall constitute a material breach and shall constitute an event of default ("Default") unless cured within two (2) Business Days after the non-breaching Party delivers to the breaching Party written notice of the breach. Provided further that if such a material breach, regardless of whether the breaching Party cures the breach within the allotted time after notice of the material breach, occurs more than three (3) times in a twelve-month period, the fourth such breach shall constitute a Default by the breaching Party.
- (2) For any material breach other than a material breach described in Section 8(A)(1) the occurrence and continuation of any of the following events shall constitute an event of Default by Participant:

- (a) Except as excused under subsection (4) or (5) below, a material breach, other than a material breach described in Section 8(A)(1), of this Agreement by Participant, including any material failure by Participant to comply with the ERCOT Protocols, unless cured within fourteen (14) Business Days after delivery by ERCOT of written notice of the material breach to Participant. Participant must begin work or other efforts within three (3) Business Days to cure such material breach after delivery by ERCOT of written notice of such material breach by Participant and must prosecute such work or other efforts with reasonable diligence until the breach is cured. Provided further that if a material breach, regardless of whether such breach is cured within the allotted time after notice of the material breach, occurs more than three (3) times within twelve-month period, the fourth such breach shall constitute a Default.
- (b) Participant becomes Bankrupt, except for the filing of a petition in involuntary bankruptcy, or similar involuntary proceedings, that is dismissed within 90 days thereafter.
- (3) Except as excused under subsection (4) or (5) below, a material breach of this Agreement by ERCOT, including any material failure by ERCOT to comply with the ERCOT Protocols, other than a failure to make payment or transfer funds, shall constitute a Default by ERCOT unless cured within fourteen (14) Business Days after delivery by Participant of written notice of the material breach to ERCOT. ERCOT must begin work or other efforts within three (3) Business Days to cure such material breach after delivery by Participant of written notice of such material breach by ERCOT and must prosecute such work or other efforts with reasonable diligence until the breach is cured. Provided further that if a material breach, regardless of whether such breach is cured within the allotted time after notice of the material breach, occurs more than three (3) times within a twelve-month period, the fourth such breach shall constitute a Default.
- (4) For any material breach other than a failure to make payment or transfer funds, the breach shall not result in a Default if the breach cannot reasonably be cured within fourteen (14) calendar days, prompt written notice is provided by the breaching Party to the other Party, and the breaching Party began work or other efforts to cure the breach within three (3) Business Days after delivery of the notice to the breaching Party and prosecutes the curative work or efforts with reasonable diligence until the curative work or efforts are completed.
- (5) If, due to a Force Majeure Event, a Party is in breach with respect to any obligation hereunder, such breach shall not result in a Default by that Party.

**B. Remedies for Default.**

- (1) ERCOT's Remedies for Default. In the event of a Default by Participant, ERCOT may pursue any remedies ERCOT has under this Agreement, at law, or in equity,

subject to the provisions of Section 10: Dispute Resolution of this Agreement. In the event of a Default by Participant, if the ERCOT Protocols do not specify a remedy for a particular Default, ERCOT may, at its option, upon written notice to Participant, immediately terminate this Agreement, with termination to be effective upon the date of delivery of notice.

(2) Participant's Remedies for Default.

(a) Unless otherwise specified in this Agreement or in the ERCOT Protocols, and subject to the provisions of Section 10: Dispute Resolution of this Agreement in the event of a Default by ERCOT, Participant's remedies shall be limited to:

(i) Immediate termination of this Agreement upon written notice to ERCOT,

(ii) Monetary recovery in accordance with the Settlement procedures set forth in the ERCOT Protocols, and

(iii) Specific performance.

(b) However, in the event of a material breach by ERCOT of any of its representations, warranties or covenants, Participant's sole remedy shall be immediate termination of this Agreement upon written notice to ERCOT.

(c) If as a final result of any dispute resolution, ERCOT, as the settlement agent, is determined to have over-collected from a Market Participant(s), with the result that refunds are owed by Participant to ERCOT, as the settlement agent, such Market Participant(s) may request ERCOT to allow such Market Participant to proceed directly against Participant, in lieu of receiving full payment from ERCOT. In the event of such request, ERCOT, in its sole discretion, may agree to assign to such Market Participant ERCOT's rights to seek refunds from Participant, and Participant shall be deemed to have consented to such assignment. This subsection (c) survives termination of this Agreement.

(3) A Default or breach of this Agreement by a Party shall not relieve either Party of the obligation to comply with the ERCOT Protocols.

C. Force Majeure.

(1) If, due to a Force Majeure Event, either Party is in breach of this Agreement with respect to any obligation hereunder, such Party shall take reasonable steps, consistent with Good Utility Practice, to remedy such breach. If either Party is unable to fulfill any obligation by reason of a Force Majeure Event, it shall give

notice and the full particulars of the obligations affected by such Force Majeure Event to the other Party in writing or by telephone (if followed by written notice) as soon as reasonably practicable, but not later than fourteen (14) calendar days, after such Party becomes aware of the event. A failure to give timely notice of the Force Majeure event shall constitute a waiver of the claim of Force Majeure Event. The Party experiencing the Force Majeure Event shall also provide notice, as soon as reasonably practicable, when the Force Majeure Event ends.

- (2) Notwithstanding the foregoing, a Force Majeure Event does not relieve a Party affected by a Force Majeure Event of its obligation to make payments or of any consequences of non-performance pursuant to the ERCOT Protocols or under this Agreement, except that the excuse from Default provided by subsection 8.A(5) above is still effective.

D. Duty to Mitigate. Except as expressly provided otherwise herein, each Party shall use commercially reasonable efforts to mitigate any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

Section 9. Limitation of Damages and Liability and Indemnification.

- A. EXCEPT AS EXPRESSLY LIMITED IN THIS AGREEMENT OR THE ERCOT PROTOCOLS, ERCOT OR PARTICIPANT MAY SEEK FROM THE OTHER, THROUGH APPLICABLE DISPUTE RESOLUTION PROCEDURES SET FORTH IN THE ERCOT PROTOCOLS, ANY MONETARY DAMAGES OR OTHER REMEDY OTHERWISE ALLOWABLE UNDER TEXAS LAW, AS DAMAGES FOR DEFAULT OR BREACH OF THE OBLIGATIONS UNDER THIS AGREEMENT; PROVIDED, HOWEVER, THAT NEITHER PARTY IS LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY THAT MAY OCCUR, IN WHOLE OR IN PART, AS A RESULT OF A DEFAULT UNDER THIS AGREEMENT, A TORT, OR ANY OTHER CAUSE, WHETHER OR NOT A PARTY HAD KNOWLEDGE OF THE CIRCUMSTANCES THAT RESULTED IN THE SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY, OR COULD HAVE FORESEEN THAT SUCH DAMAGES OR INJURY WOULD OCCUR.
- B. With respect to any dispute regarding a Default or breach by ERCOT of its obligations under this Agreement, ERCOT expressly waives any Limitation of Liability to which it may be entitled under the Charitable Immunity and Liability Act of 1987, Tex. Civ. Prac. & Rem. Code §84.006, or successor statute.
- C. The Parties have expressly agreed that, other than subsections A and B of this Section, this Agreement shall not include any other limitations of liability or indemnification provisions, and that such issues shall be governed solely by applicable law, in a manner consistent with the Choice of Law and Venue subsection of this Agreement, regardless of any contrary provisions that may be included in or subsequently added to the ERCOT Protocols (outside of this Agreement).

- D. The Independent Market Monitor (IMM), and its directors, officers, employees, and agents, shall not be liable to any person or entity for any act or omission, other than an act or omission constituting gross negligence or intentional misconduct, including but not limited to liability for any financial loss, loss of economic advantage, opportunity cost, or actual, direct, indirect, or consequential damages of any kind resulting from or attributable to any such act or omission of the IMM, as long as such act or omission arose from or is related to matters within the scope of the IMM's authority arising under or relating to PURA §39.1515 and PUC Subst. R. 25.365, Independent Market Monitor.

#### Section 10. Dispute Resolution.

- A. In the event of a dispute, including a dispute regarding a Default, under this Agreement, Parties to this Agreement shall first attempt resolution of the dispute using the applicable dispute resolution procedures set forth in the ERCOT Protocols.
- B. In the event of a dispute, including a dispute regarding a Default, under this Agreement, each Party shall bear its own costs and fees, including, but not limited to attorneys' fees, court costs, and its share of any mediation or arbitration fees.

#### Section 11. Miscellaneous.

- A. Choice of Law and Venue. Notwithstanding anything to the contrary in this Agreement, this Agreement shall be deemed entered into and performable solely in Texas and, with the exception of matters governed exclusively by federal law, shall be governed by and construed and interpreted in accordance with the laws of the State of Texas that apply to contracts executed in and performed entirely within the State of Texas, without reference to any rules of conflict of laws. Neither Party waives primary jurisdiction as a defense; provided that any court suits regarding this Agreement shall be brought in a state or federal court located within Travis County, Texas, and the Parties hereby waive any defense of forum non-conveniens, except defenses under Tex. Civ. Prac. & Rem. Code §15.002(b).
- B. Assignment.
- (1) Notwithstanding anything herein to the contrary, a Party shall not assign or otherwise transfer all or any of its rights or obligations under this Agreement without the prior written consent of the other Party, which shall not be unreasonably withheld or delayed, except that a Party may assign or transfer its rights and obligations under this Agreement without the prior written consent of the other Party (if neither the assigning Party or the assignee is then in Default of any Agreement with ERCOT):
- (a) Where any such assignment or transfer is to an Affiliate of the Party; or

- (b) Where any such assignment or transfer is to a successor to or transferee of the direct or indirect ownership or operation of all or part of the Party, or its facilities; or
  - (c) For collateral security purposes to aid in providing financing for itself, provided that the assigning Party will require any secured party, trustee or mortgagee to notify the other Party of any such assignment. Any financing arrangement entered into by either Party pursuant to this Section will provide that prior to or upon the exercise of the secured party's, trustee's or mortgagee's assignment rights pursuant to said arrangement, the secured creditor, the trustee or mortgagee will notify the other Party of the date and particulars of any such exercise of assignment right(s). If requested by the Party making any such collateral assignment to a Financing Person, the other Party shall execute and deliver a consent to such assignment containing customary provisions, including representations as to corporate authorization, enforceability of this Agreement and absence of known Defaults, notice of material breach pursuant to Section 8(A), notice of Default, and an opportunity for the Financing Person to cure a material breach pursuant to Section 8(A) prior to it becoming a Default.
- (2) An assigning Party shall provide prompt written notice of the assignment to the other Party. Any attempted assignment that violates this Section is void and ineffective. Any assignment under this Agreement shall not relieve either Party of its obligations under this Agreement, nor shall either Party's obligations be enlarged, in whole or in part, by reason thereof.
- C. No Third Party Beneficiary. Except with respect to the rights of other Market Participants in Section 8.B. and the Financing Persons in Section 11.B., (i) nothing in this Agreement nor any action taken hereunder shall be construed to create any duty, liability or standard of care to any third party, (ii) no third party shall have any rights or interest, direct or indirect, in this Agreement or the services to be provided hereunder and (iii) this Agreement is intended solely for the benefit of the Parties, and the Parties expressly disclaim any intent to create any rights in any third party as a third-party beneficiary to this Agreement or the services to be provided hereunder. Nothing in this Agreement shall create a contractual relationship between one Party and the customers of the other Party, nor shall it create a duty of any kind to such customers.
- D. No Waiver. Parties shall not be required to give notice to enforce strict adherence to all provisions of this Agreement. No breach or provision of this Agreement shall be deemed waived, modified or excused by a Party unless such waiver, modification or excuse is in writing and signed by an authorized officer of such Party. The failure by or delay of either Party in enforcing or exercising any of its rights under this Agreement shall: (i) not be deemed a waiver, modification or excuse of such right or of any breach of the same or different provision of this Agreement, and (ii) not prevent a subsequent enforcement or exercise of such right. Each Party shall be entitled to enforce the other Party's covenants

and promises contained herein, notwithstanding the existence of any claim or cause of action against the enforcing Party under this Agreement or otherwise.

- E. Headings. Titles and headings of paragraphs and sections within this Agreement are provided merely for convenience and shall not be used or relied upon in construing this Agreement or the Parties' intentions with respect thereto.
- F. Severability. In the event that any of the provisions, or portions or applications thereof, of this Agreement is finally held to be unenforceable or invalid by any court of competent jurisdiction, that determination shall not affect the enforceability or validity of the remaining portions of this Agreement, and this Agreement shall continue in full force and effect as if it had been executed without the invalid provision; provided, however, if either Party determines, in its sole discretion, that there is a material change in this Agreement by reason thereof, the Parties shall promptly enter into negotiations to replace the unenforceable or invalid provision with a valid and enforceable provision. If the Parties are not able to reach an agreement as the result of such negotiations within fourteen (14) days, either Party shall have the right to terminate this Agreement on three (3) days written notice.
- G. Entire Agreement. Any Exhibits attached to this Agreement are incorporated into this Agreement by reference and made a part of this Agreement as if repeated verbatim in this Agreement. This Agreement represents the Parties' final and mutual understanding with respect to its subject matter. It replaces and supersedes any prior agreements or understandings, whether written or oral. No representations, inducements, promises, or agreements, oral or otherwise, have been relied upon or made by any Party, or anyone on behalf of a Party, that are not fully expressed in this Agreement. An agreement, statement, or promise not contained in this Agreement is not valid or binding.
- H. Amendment. The standard form of this Agreement may only be modified through the procedure for modifying ERCOT Protocols described in the ERCOT Protocols. Any changes to the terms of the standard form of this Agreement shall not take effect until a new Agreement is executed between the Parties.
- I. ERCOT's Right to Audit Participant. Participant shall keep detailed records for a period of three years of all activities under this Agreement giving rise to any information, statement, charge, payment or computation delivered to ERCOT under the ERCOT Protocols. Such records shall be retained and shall be available for audit or examination by ERCOT as hereinafter provided. ERCOT has the right during Business Hours and upon reasonable written notice and for reasonable cause to examine the records of Participant as necessary to verify the accuracy of any such information, statement, charge, payment or computation made under this Agreement. If any such examination reveals any inaccuracy in any such information, statement, charge, payment or computation, the necessary adjustments in such information, statement, charge, payment, computation, or procedures used in supporting its ongoing accuracy will be promptly made.



- J. Participant's Right to Audit ERCOT. Participant's right to data and audit of ERCOT shall be as described in the ERCOT Protocols and shall not exceed the rights described in the ERCOT Protocols.
- K. Further Assurances. Each Party agrees that during the term of this Agreement it will take such actions, provide such documents, do such things and provide such further assurances as may reasonably be requested by the other Party to permit performance of this Agreement.
- L. Conflicts. This Agreement is subject to applicable federal, state, and local laws, ordinances, rules, regulations, orders of any Governmental Authority and tariffs. Nothing in this Agreement may be construed as a waiver of any right to question or contest any federal, state and local law, ordinance, rule, regulation, order of any Governmental Authority, or tariff. In the event of a conflict between this Agreement and an applicable federal, state, and local law, ordinance, rule, regulation, order of any Governmental Authority or tariff, the applicable federal, state, and local law, ordinance, rule, regulation, order of any Governmental Authority or tariff shall prevail, provided that Participant shall give notice to ERCOT of any such conflict affecting Participant. In the event of a conflict between the ERCOT Protocols and this Agreement, the provisions expressly set forth in this Agreement shall control.
- M. No Partnership. This Agreement may not be interpreted or construed to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party has any right, power, or authority to enter any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party except as provided in Section 7A.
- N. Construction. In this Agreement, the following rules of construction apply, unless expressly provided otherwise or unless the context clearly requires otherwise:
- (1) The singular includes the plural, and the plural includes the singular.
  - (2) The present tense includes the future tense, and the future tense includes the present tense.
  - (3) Words importing any gender include the other gender.
  - (4) The word "shall" denotes a duty.
  - (5) The word "must" denotes a condition precedent or subsequent.
  - (6) The word "may" denotes a privilege or discretionary power.
  - (7) The phrase "may not" denotes a prohibition.

- (8) References to statutes, tariffs, regulations or ERCOT Protocols include all provisions consolidating, amending, or replacing the statutes, tariffs, regulations or ERCOT Protocols referred to.
  - (9) References to "writing" include printing, typing, lithography, and other means of reproducing words in a tangible visible form.
  - (10) The words "including," "includes," and "include" are deemed to be followed by the words "without limitation."
  - (11) Any reference to a day, week, month or year is to a calendar day, week, month or year unless otherwise indicated.
  - (12) References to Articles, Sections (or subdivisions of Sections), Exhibits, annexes or schedules are to this Agreement, unless expressly stated otherwise.
  - (13) Unless expressly stated otherwise, references to agreements, ERCOT Protocols and other contractual instruments include all subsequent amendments and other modifications to the instruments, but only to the extent the amendments and other modifications are not prohibited by this Agreement.
  - (14) References to persons or entities include their respective successors and permitted assigns and, for governmental entities, entities succeeding to their respective functions and capacities.
  - (15) References to time are to Central Prevailing Time.
- O. Multiple Counterparts. This Agreement may be executed in two or more counterparts, each of which is deemed an original but all constitute one and the same instrument.

SIGNED, ACCEPTED AND AGREED TO by each undersigned signatory who, by signature hereto, represents and warrants that he or she has full power and authority to execute this Agreement.

*Electric Reliability Council of Texas, Inc.:*

By: A. Andrew Gallo

Name: A. Andrew Gallo

Title: Assistant General Counsel

Date: 4-11-08

**Participant:**

**USE OPTION 1 IF PARTICIPANT IS A CORPORATION**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**USE OPTION 2 IF PARTICIPANT IS A LIMITED PARTNERSHIP**

By: Gary Mole as General Partner for Insert

Name of Participant

Name: Gary Mole

Title: \_\_\_\_\_

Date: March 26, 2008

Market Participant Name: Glacial Energy of Texas Inc

Market Participant DUNS: 605515472